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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CAROLINA, CLINCHFIELD AND OHIO RAILWAY, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

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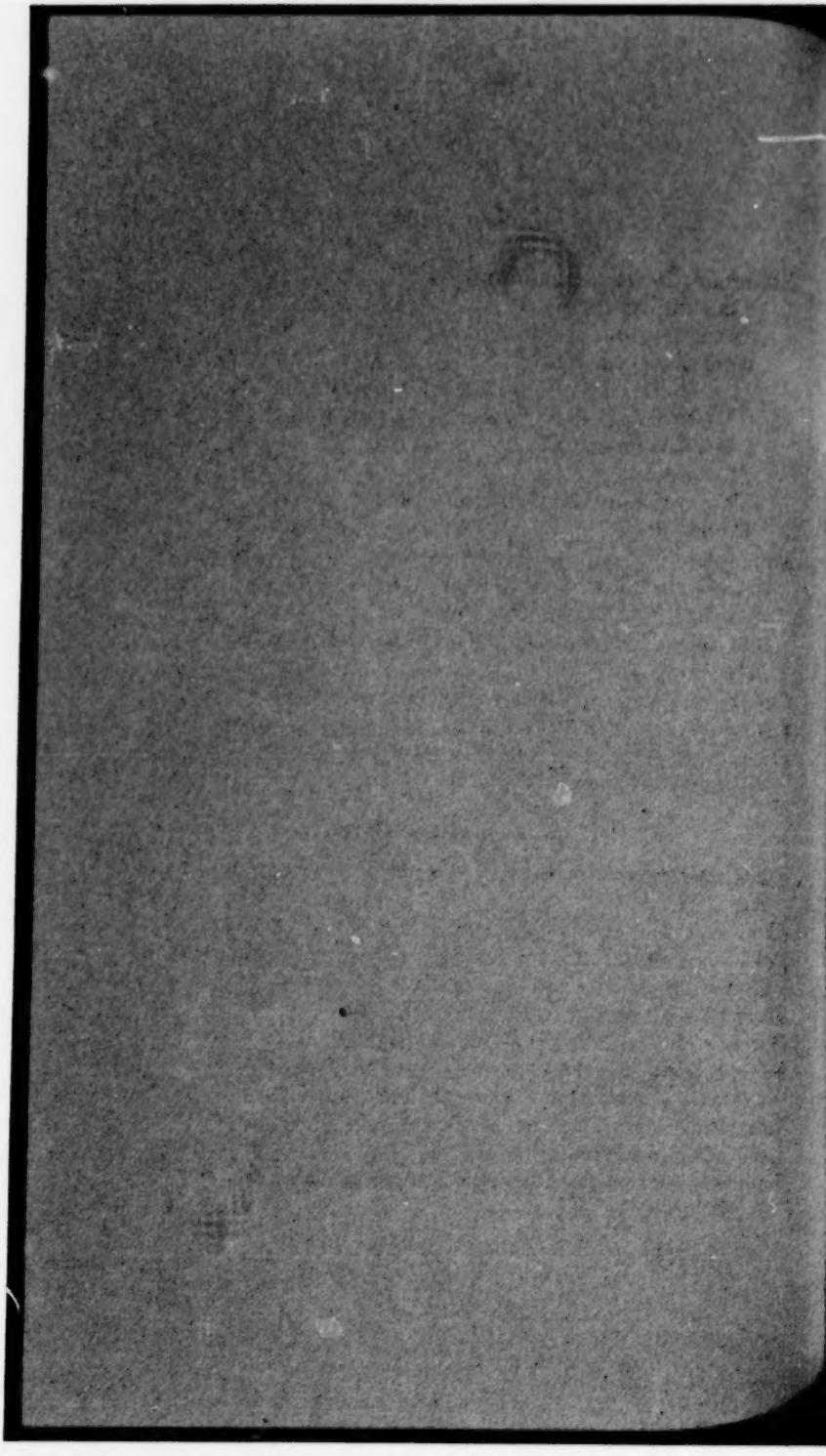

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Interstate Commerce Act:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMISSION, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the plaintiffs and the intervening plaintiff, Tennessee Valley Authority, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The district court did not render an opinion. Copies of the findings of fact and conclusions of law, and of the judg-

ment are attached hereto as Appendix A. Copies of the report and order of the Interstate Commerce Commission,[1] which the plaintiffs seek to have suspended, annulled, enjoined, and set aside in this action, are attached hereto as Appendix B.

Jurisdiction

The judgment of the district court was entered on July 31, 1953. A petition for appeal is presented to the district court herewith, to-wit, on September 2, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, sections 1253 (62 Stat. 928) and 2101(b) (62 Stat. 962). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Co.*, 325 U.S. 357; *North Carolina* v. *United States*, 325 U.S. 507; *King* v. *United States*, 344 U.S. 254.

Questions Presented[2]

A. *By the ICC Order as to Coal Rates*

1. Whether the ICC has authority to require that intrastate rates on a given commodity take the same increase as it has authorized on interstate rates in a general revenue proceeding, where the intrastate rates without the increase are already higher than the interstate rates with the increase and are contributing a greater proportionate share of the carriers' revenues.

2. Where in a proceeding under sections 13(3) and (4)

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[1] Hereinafter referred to as the "ICC."

[2] All the points raised in the assignment of errors are presented. The questions stated below set forth the major issues.

and 15a(2)[3] of the Interstate Commerce Act substantial evidence has been introduced that the intrastate rates on coal are on a higher basis than the interstate rates and are contributing a greater proportionate share of the carriers' revenues, whether an order raising the intrastate rates on coal on the ground that the interstate rates are causing undue, unreasonable, and unjust discrimination against interstate commerce is valid in the absence of a subsidiary finding that the intrastate rates are lower or are contributing a lesser proportionate share of the carriers' revenues than the interstate rates.

3. Whether the order referred to in question No. 2 is valid although there is no substantial evidence that the intrastate rates are lower or are contributing a lesser proportionate share of the carriers' revenues than the interstate rates.

4. Whether a state-wide order requiring that intrastate rates on coal be raised on the ground that such rates are causing undue preference and prejudice, supported only by a finding that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce," is valid in the absence of a subsidiary finding specifying the particular rates which are causing undue preference and prejudice and the shippers or localities which are unduly prejudiced.

5. Whether the state-wide order referred to in question No. 4 is valid in the absence of a subsidiary finding sufficiently specific to form a basis for a conclusion that the

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[3] Section 13(3) and (4), 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U.S.C. sec. 13(3) and (4).

Sec. 15a(2), 41 Stat. 488, as amended, 48 Stat. 220, as amended, 54 Stat. 912, 49 U.S.C. sec. 15a(2).

alleged preference and prejudice are so widespread and general as to justify a state-wide order.

6. Whether the state-wide order referred to in question No. 4 is valid although there is no substantial evidence that the alleged preference and prejudice are so widespread and general as to justify a state-wide order.

B. *By the ICC Order as to Pulpwood Rates*

1. Where a number of the major railroads, including some operating within the state, have established a scale of rates, on pulpwood, both interstate and intrastate within Southern Territory, which is lower than the scale authorized intrastate by the state commission, whether an order raising the intrastate pulpwood rates of the railroads in the states which have not adopted the lower scale on the ground that the intrastate rates are causing undue, unreasonable, and unjust discrimination against interstate commerce, is valid in the absence of a subsidiary finding either that operating conditions on such railroads are less favorable or that their needs for revenues are greater than those of the railroads which maintain a level of rates lower than authorized by the state commission.

Statutes Involved

Sections 13(3) and (4) and 15a(2) of the Interstate Commerce Act, as amended, and sections 7(c), 8(b), and 10(e) [4] of the Administrative Procedure Act are set forth in Appendix C hereto attached.

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[4] Sec. 7(c), 60 Stat. 241, 5 U.S.C. sec. 1006(c).
Sec. 8(b), 60 Stat. 242, 5 U.S.C. sec. 1007(b).
Sec. 10(e) 60 Stat. 243, 5 U.S.C. sec. 1009(e).

Statement

This case arises out of the series of general increases in railroad rates authorized by the ICC since 1946.[5] In Ex Parte 166 the ICC authorized the rail carriers to increase interstate freight rates generally in Southern Territory by 25 per cent, subject to various maxima and exceptions applicable to particular commodities. Following a hearing on the request of the railroads operating in Tennessee for like increases in Tennessee intrastate rates, the Tennessee Railroad and Public Utilities Commission granted the requested increases in full on all except five commodity groups, on which it authorized lesser increases.[6] In Ex Parte 168, the ICC granted a further increase of 10 per cent in interstate freight rates in Southern Territory, again subject to various exceptions and maxima. The Tennessee Commission authorized identical increases, with minor exceptions which are not here material.[7]

On petition of the rail carriers, the ICC thereafter instituted an investigation into the lawfulness of such rates in a proceeding entitled *Tennessee Intrastate Rates and Charges*, ICC Docket No. 30720.

Between the date of the decision of the Tennessee Commission in the proceeding before it involving the Ex Parte 166 increases and the decision of the ICC in Docket No. 30720, all of the disagreements between the parties had

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[5] This is the same series of increases involved in *King* v. *United States*, 344 U.S. 254, but the legal issues involved are different.

[6] On coal the ICC authorized a 20 per cent increase with a 40-cent per ton maximum; the Tennessee Commission authorized a 10 per cent increase with the same 40-cent per ton maximum. On wood the ICC authorized a 25 per cent and the Tennessee Commission a 15 per cent increase. As to other commodities, see footnote 8, *infra*.

[7] On coal and wood the same percentage increases were authorized but the increases were less in cents per ton than they would have been had the Tennessee Commission authorized the same increases intrastate as were authorized by the ICC for interstate traffic in Ex Parte 166.

been resolved except as to certain of the rates on coal and wood.[8] No issue was made before the district court as to wood other than pulpwood, thus leaving in issue only certain rates on coal and pulpwood.

At the hearing before the ICC examiner the plaintiffs[9] contended that, on the average, the intrastate rates on coal were on a higher level and were contributing a greater proportionate share of the revenues of the carriers than were the interstate rates.[10]

The principal evidence submitted in support of this contention was a cost study showing the average relationship of interstate and intrastate rates to the out-of-pocket and full distributed costs of handling the traffic.[11]

The costs were computed by an experienced transportation cost analyst in accordance with the formula known as Rail Form A. This form was developed by the ICC cost section for use in *Class Rate Investigations*, 1939, 262 I.C.C. 447 (sustained in *New York* v. *United States*, 331

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[8] These differences were resolved in three different ways. On some commodities the railroads voluntarily reduced their rates to levels lower than those authorized by the Tennessee Commission. Among the rates so reduced were a large segment of the rates on coal and pulpwood. As to other commodities, there was no showing of any intrastate movement at the hearing and therefore no order as to them was entered by the ICC. Finally, when the examiner who heard the case concluded that the intrastate rates on certain commodities given special treatment by the Tennessee Commission violated section 13(4) of the Interstate Commerce Act, the Tennessee Commission authorized the railroads to put into effect all of the increases which the examiner had recommended.

[9] Unless otherwise specified, the term "plaintiffs" as used herein includes the intervening plaintiff, Tennessee Valley Authority.

[10] They also contended that the coal industry in Tennessee was in a desperate situation due to competition of natural gas, oil, electricity, and lower-cost coal produced in adjoining states, and that there was substantial diversion to trucks of what intrastate coal movements remained.

[11] There is no distance scale of rates applicable to coal within the south. The relative levels of interstate and intrastate rates can be shown, therefore, only by the use of representative or average rates.

U. S. 284).[12] It was a major factor in the determination of that case and has since been used and relied on by the ICC in many other cases. The application of the Rail Form A formula makes it possible to ascertain the terminal cost and the cost per ton-mile of transporting a given commodity once the characteristics of the movement are defined.[13] The cost for any specified length of haul is then obtained by multiplying the number of miles by the car-mile cost, adding the terminal cost, and then dividing by the average number of tons per car.

The data as to average haul and average loading of interstate and intrastate movements required to complete the Rail Form A and the data as to average rates necessary to determine the relationship of rates to cost was obtained from studies prepared by the staff of the ICC which give statistics as to movements of coal in the year 1939, based on a one per cent sample of waybills covering railroad freight movements in that year. From this study the witness computed the average rates, distances, and loading for movements between points in Tennessee,[14] and for interstate movements within the south.

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[12] See *International Minerals & Chemical Corp.* v. *Atlantic Coast Line R. R.*, 269 I.C.C. 611, 623. The basic principle of Rail Form A is to classify all railroad operations among five so-called service groups—running, switching, station, special services, and general overhead expenses—and to assign to each service group an appropriate share of the various elements of rail transportation costs. Each individual expense account is assigned or apportioned to one or more of the service groups in accordance with standards specified in the formula. When this process is completed, the amounts assigned to each service group are aggregated and divided by the number of service units. For example, the costs which have been assigned on a cost per gross ton-mile basis are divided by the number of gross ton-miles to obtain the unit cost per ton-mile. The formula is discussed in *Class Rate Investigation*, 1939, 262 I.C.C. 447, 571-591, and in *New York* v. *United States*, 331 U. S. 284, 316-321.

[13] The transportation characteristics which must be defined include type of equipment, average loading, percentage of empty returns, loss and damage, etc.

[14] The movements between points in Tennessee include whatever traffic moves between points in Tennessee over interstate routes.

The application of the cost formula to the data computed from the waybill study shows that, on any basis of comparison, the intrastate rates without the increases produce a higher return above cost than do the interstate rates with the increases. The results of such application are as follows:

	Percentage of Out-of-Pocket Cost		Percentage of Full Distributed Cost—Constant Costs Applied On	
	Excluding Return on Value	Including Return on Value	Ton and Ton-Mile Basis	Basis of Out-of-Pocket Costs
Intrastate rates (without increases)	188%	174%	101%	115%
Interstate rates (with increases)	187%	168%	98%	111%

The cost testimony presented by plaintiffs is the only cost testimony in the record. The railroads offered none.

As to pulpwood, the facts as to the levels of interstate and intrastate rates maintained by the various railroads are undisputed. Plaintiffs contend that it is unlawful to require that the intrastate rates on some railroads operating in Tennessee be increased above the level authorized by the Tennessee Commission when that level is already above the interstate rates maintained by a number of railroads in Southern Territory, including the Southern and the CNO&TP, in the absence of any showing of a difference in operating conditions or need for revenue.

The ICC concluded that the intrastate rates on coal and pulpwood cause a revenue discrimination against interstate commerce but made no finding that the intrastate rates on coal were lower or less remunerative than the interstate rates. Neither did it find that operating condi-

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tions for pulpwood traffic on the other railroads in Tennessee were less favorable than on the Southern and the CNO&TP, or that the other railroads have any greater need for revenue from pulpwood traffic. As to coal, the ICC entered a state-wide order based on persons-and-places discrimination although its subsidiary finding is only that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities to the undue disadvantage of and prejudice to other shippers and localities, without specifying the rates, shippers, or localities.

The plaintiffs filed suit in the United States District Court for the Middle District of Tennessee to enjoin, annul, and set aside the ICC's report and order and the Tennessee Valley Authority intervened in support of the complaint.

The case was heard by a statutory three-judge court which made findings of fact and conclusions of law and entered a judgment dismissing the complaint. The legal questions on which the plaintiffs rely as outlined herein were argued to the court but most of them are not touched on in the findings of fact and conclusions of law. The court wrote no opinion.

The Questions Are Substantial

1. In previous cases before this Court involving the jurisdiction of the ICC under sections 13(3) and (4) and 15a(2) of the Interstate Commerce Act, the intrastate rates were concededly on a lower level than the interstate rates, and the issue was whether, under the circumstances disclosed by the record, the ICC had authority to require that the intrastate rates be raised to the interstate level. See *King* v. *United States*, 344 U. S. 254; *North Carolina* v. *United States*, 325 U. S. 507. So far as we are aware, this is the first case in which the ICC, faced with substantial evidence that the intrastate rates were on a higher level

and returning a greater percentage of revenue above cost than were the interstate rates, and with no substantial evidence to the contrary, has nevertheless ordered that the higher intrastate rates take the same increase as the lower interstate rates. This case, therefore, presents an attempt by the ICC to extend its jurisdiction over intrastate rates beyond any limits heretofore approved by this Court and raises a new and important question as to the authority of the ICC in general increase cases.

2. Section 8(b) of the Administrative Procedure Act requires the ICC to include in its decisions a statement of its findings and conclusions upon the material issues of fact presented on the record, and this Court has repeatedly stated that the ultimate conclusions of the ICC will stand only if supported by the necessary subsidiary findings.[15] The basic findings essential to the validity to any given order "will vary with the statutory authority invoked and the context of the situation presented" (*Alabama Great Southern R. R.* v. *United States*, 340 U. S. 216, 228), but the findings must be sufficient to show that the ICC has properly construed the statute. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

Substantial evidence was introduced at the ICC hearing that the intrastate rates on coal were already higher than the interstate rates and were returning a greater proportionate share of the revenues required by the carriers. In the absence of a specific finding on this issue, the Court cannot know whether the ICC has construed its authority as permitting it to require that intrastate rates take all of the same increases as interstate rates even though they are already on a higher level and more remunerative. No such finding was made.

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[15] *King* v. *United States*, 344 U. S. 254, 269; *North Carolina* v. *United States*, 325 U.S. 507, 520; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

None of the findings made by the ICC is a substitute for the necessary finding that the intrastate rates on coal are on a lower level than the interstate rates or are returning a lesser proportionate share of the revenues required by the rail carriers. The ICC found that the intrastate rates on coal "are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably," but without the support of subsidiary findings, this is merely a conclusion; the ICC's concept of what constitutes a fair contribution for the intrastate rates here involved may well be a greater proportionate share than is being contributed by the interstate rates. This finding should be contrasted with the ICC finding in the proceeding involved in *King* v. *United States*, 344 U. S. 254. Although no question was raised in that proceeding as to the relative level of the interstate and intrastate rates, the ICC found that the Florida intrastate rates "*are abnormally low and are not contributing their fair share to the revenues* required by respondents to enable them to render adequate and efficient service and to operate profitably" (*King* v. *United States*, 344 U. S. 254, 268 (footnote 13)).

The omission by the ICC of the finding that the Tennessee intrastate rates "are abnormally low" in a finding which otherwise follows almost verbatim its finding with reference to the Florida intrastate rates cannot have been due to inadvertance. At sheet 22 of its report the ICC refers to the contentions "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates." In discussing this contention the report does not question the propriety of using Rail Form A to determine the relative costs of handling interstate and intra-

state coal traffic, nor does it question the accuracy of the cost computations made by the witness. Its only criticism of the cost study is directed to the use of the underlying data obtained from the ICC waybill study. The point is made that the witness was not familiar with "the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates changed." However, the witness used the waybill study simply to determine average rates, distances, and loadings for interstate and intrastate movements (and the ICC does not suggest that the one per cent sample was not representative.)

The use of the waybill study is also criticized on the ground that the Tennessee-to-Tennessee movement includes some interstate traffic moving between Tennessee points. But this fact does not destroy the probative value of the study. The study discloses that the average of the rates between points in Tennessee is higher in relation to cost than the average of the interstate rates. Unless, therefore, the interstate rates between points in Tennessee are on a higher basis than other interstate rates (and there is no such evidence in the record), the effect of including the interstate rates between points in Tennessee with the intrastate rates is to make the latter appear lower than they are.

The burden of proof on this issue was on the railroads (Administrative Procedure Act, sec. 7(c)). The railroads had complete data as to the interstate and intrastate movements but chose not to supply it for the record. The plaintiffs are entitled to the assumption that the data, if supplied, would have been unfavorable to their position[16]

[16] The picture presented by the waybill study can be corroborated by computing the relationship to cost of the rates shown on exhibits 5, 6, and 7 introduced by the L&N Railroad. These exhibits contain all necessary data as to distances and rates for movements originated by the

(*Interstate Circuit* v. *United States*, 306 U. S. 208, 226). The plaintiffs used the published data that was available and the showing they made should not be criticized because the ICC's waybill study does not break down the Tennessee-to-Tennessee movements between interstate and intrastate traffic.

Furthermore, since there was no substantial evidence to the contrary, the statement by the ICC that the plaintiffs' cost computations do not support "conclusively" their contention that the intrastate coal rates are generally higher and more remunerative than the interstate rates is tantamount to an admission that the evidence did support their contentions, even though not conclusively, and that had the ICC made a finding on this issue it would have

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L & N during a three-week test period. The plaintiffs' cost study discloses the cost per ton-mile and the terminal cost of handling coal traffic. To determine the relationship of these L & N rates to cost, therefore, it is necessary only to multiply the number of miles by the cost per ton-mile and add the terminal cost and then divide the cost thus ascertained by the rate. The computation does not appear in the record before the ICC but the rules of mathematics and their application under such circumstances are subject to judicial notice. See *Falls* v. *United States Savings, Loan & Bldg. Co.*, 97 Ala. 417, 431, 13 So. 25, 31; *Winterberg* v. *Thomas*, 246 P. (2d) 1058, 1061 (Colo.); *Murphy* v. *Murphy*, 144 Ark. 429, 435, 222 S. W. 721, 723; *Horen* v. *Davis*, 274 Pa. 244, 250, 118 Atl. 22, 24; *Levlon* v. *Dallas Ry. & Terminal Co.*, 117 S. W. (2d) 876, 878 (Tex. Civ. App.). A computation of the relationship of such rates to full distributed costs was attached as an appendix to our brief in the district court. The relationship shown was as follows:

	Percentage of Full Distributed Cost—Constant Costs Applied On	
	Ton and Ton-Mile Basis	Basis of Out-of-Pocket Costs
Intrastate rates shown on Exs. 5, 6, and 7	106%	121%
Interstate rates shown on Exs. 5, 6, and 7	103%	117%

had to find the facts as contended by the plaintiffs. This statement in the report can only be explained on the theory that the ICC was mistaken, both as to who had the burden of proof and what is required to meet the burden. It apparently assumed that the burden of proof lay not on the railroads but on the plaintiffs, and that the plaintiffs had the burden of proving their case not by the preponderance of the evidence but "conclusively."

An analysis of the other findings by the ICC would unduly prolong this jurisdictional statement. None of them meets the basic issue of whether the intrastate rates on coal are on as high a basis as the interstate rates and there is no substantial evidence in the record which would support a finding that they are on a lower basis had one been made. The situation presented to the Court in this case is similar to that in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, in which the Court commented:

> Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away [p. 489].

3. The contention was advanced at the hearing by certain East Kentucky and West Kentucky producers that their competitive situation had been adversely affected at certain locations in Tennessee by the failure of the Tennessee Commision to authorize the full interstate increases on intrastate movements of coal. The evidence presented as to each location was sharply contradicted by Tennessee producers

of coal. The ICC has found that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce" (sheet 30). The rates, shippers, and localities are not designated. On the basis of this finding the ICC concludes that the intrastate rates on coal "are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce" (sheet 31) and has entered a state-wide order requiring an increase in all Tennessee intrastate rates on coal, except the rates as to which the carriers have withdrawn their request for an increase. Such indefinite findings will not support a state-wide order based on persons-and-places discrimination. *Florida* v. *United States*, 282 U. S. 194, 208-209; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. R.*, 257 U. S. 563, 579-580; cf. *King* v. *United States*, 344 U. S. 254, 269 (footnote 14).

4. The Southern, the CNO&TP, and other major southern railroads have put into effect, for general application, both interstate and intrastate within Southern Territory, a scale of rates on pulpwood lower than that authorized by the Tennessee Commission. They have stated specifically that they do not desire any increase in the intrastate rates for movements on their lines, and the ICC has expressly excepted the intrastate rates over these lines from its order requiring that Tennessee intrastate rates on pulpwood be raised. There is no showing in the record that operating conditions on the railroads operating in Tennessee, other than the Southern and CNO&TP, are any less favorable than on these railroads or that the other railroads have any greater need of revenues. As to pulpwood, therefore, the question is whether the ICC can find that the intrastate rates author-

ized by the state commission impose a revenue burden on certain of the railroads simply because they are on a lower level than those railroads would like to charge where they are, in fact, on a higher level than are maintained on a large and important segment of the interstate traffic.

5. The present case is not controlled by the decision in *King* v. *United States*, 344 U. S. 254. As already pointed out, the *King* case involved rates which the ICC had found to be abnormally low. In the present case there is no such finding but, on the contrary, a record which establishes that the intrastate rates were higher than the interstate rates. Furthermore, the *King* case involved a refusal by the Florida comission to permit the same increase intrastate on commodities generally as was authorized on interstate traffic. As the Court pointed out, the ICC had fixed the increases on interstate traffic on the assumption that "generally similar increases will be permitted by States authorities on intrastate traffic" (344 U. S. 258). In the present case the Tennessee Commission has permitted "generally similar increases" but it has considered the peculiar local problems presented by specific movements of coal and pulpwood. As the Court pointed out in *King* case, it is not necessary for the ICC "for general revenue purposes, to establish for each item in each freight rate a fully developed rate case" (344 U. S. at 275). Such a procedure would obviously be impossible. But it is not impossible for the state commission, in passing on requests for and granting increases in intrastate rates "generally similar" to those granted in interstate rates, to consider the special facts involved in the intrastate movement of individual commodities and to tailor its order to meet the peculiar local needs. This is the only justification for the holding of hearings by state commissioners on proposed intrastate increases following ICC decisions in general increase cases. If state commissions

cannot go so far, the ICC, in general increase cases, should order into effect increases in intrastate as well as interstate rates. For the ICC to take such action—which would of course amount to prescribing intrastate rates rather than taking any authorized action under section 13(4) of the Interstate Commerce Act—would amount only to doing directly what it is here seeking to do indirectly. Conceivably, Congress could authorize the ICC to take such action on the basis of proper legislative findings, but it has not done so.

Conclusion

The present case involves a new and important question as to whether the ICC can extend the jurisdiction conferred upon it by section 13(4) of the Interstate Commerce Act so as to require that all intrastate rates take the same increases as are prescribed by it for interstate rates in general increase proceedings, even though the intrastate rates are already higher and more remunerative than the interstate rates. Questions of administrative law of the gravest important are also involved in the issue whether the ICC can avoid making findings on substantial issues of fact presented on the record and by resort to vague and indefinite findings can deprive the courts of the opportunity of determining whether statutory standards have been correctly applied.

Respectfully submitted,

ALFRED T. MACFARLAND,
Counsel for Plaintiff-Appellants, State of Tennessee, Railroad and Public Utilities Commission of the State of Tennessee, and Hammond Fowler, Cayce Pentecost, and John C. Hammer, as members of and constituting the Railroad and Public Utilities Commission of Tennessee;

JOSEPH C. SWIDLER,
Counsel for Intervening Plaintiff-Appellant Tennessee Valley Authority.

APPENDIX "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW, DATED JUNE 8TH, 1953, AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, DATED JULY 31ST, 1953

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil No. 1595

STATE OF TENNESSEE AND RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, ET AL.,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

FINDINGS AND CONCLUSIONS

The above entitled action was heard before the duly constituted statutory court composed of Honorable John D. Martin, Circuit Judge, presiding, Honorable Elmer D. Davies, District Judge, and Honorable Marion S. Boyd, District Judge, on May 18, 1953.

Appearances: For plaintiffs, Alfred T. MacFarland, General Counsel, Railroad and Public Utilities Commission of Tennessee, Nashville, Tennessee. For intervenor in support of the complaint, Robt. H. Marquis, Attorney, Tennessee Valley Authority, Knoxville, Tennessee. For defendants, A. O. Denning, United States Attorney, Nashville, Tennessee, and S. R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C. For intervenors in opposition to the complaint, C. P. Reynolds, Attorney, Washington, D. C., James A. Bristline, Attorney, Washington, D. C., and Robert E. Webb, Attorney, Louisville, Kentucky.

The cause was submitted upon the pleadings, exhibits, and argument of counsel for plaintiffs, intervenors, and

defendants, and, after due consideration thereof, the Court enters its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. In a case known as Ex Parte 166, the Class 1 rail carriers applied to the Interstate Commerce Commission (hereinafter called the ICC) for a general increase of their freight rates and charges. The ICC, in response to the application, granted an increase of 25 per cent in freight rates and charges generally in southern territory, with certain modifications as respects particular commodities. The ICC granted an increase in southern territory interstate coal rates of 20 per cent, subject to a maximum of 40 cents per net ton, and an increase of 25 per cent in southern territory interstate rates on wood.

2. Subsequent to the final decision of the ICC in Ex Parte 166, the rail carriers operating in Tennessee petitioned the Railroad and Public Utilities Commission of Tennessee (hereinafter called the Tennessee Commission) for the same percentage increases in Tennessee intrastate rates (with certain exceptions as to some commodities) which the ICC had granted in interstate rates. All of these carriers requested the full interstate increases in Tennessee intrastate coal rates. They also originally requested the full interstate increases in wood rates, but the Southern and the C. N. O. & T. P. withdrew their request for any intrastate increase in pulpwood rates, having previously applied to the Tennessee Commission for authority to put into effect in Tennessee, as soon as certain contingencies had been met, intrastate rates on pulpwood lower than those previously authorized by the Tennessee Commission. Pulpwood rates in southern territory have been based on the so-called Roanoke Rapids scale, adopted by the Seaboard Airline Railroad in 1909. Since that date, there have been authorized increases in interstate pulpwood rates of 81.5 per cent above the Roanoke Rapids scale, and increases in intrastate rates in various southern states ranging from 19.9 per cent in South Carolina to 67.9 per cent in Mississippi. The increases authorized in Tennessee intrastate rates are 59.4 per cent. On November 1, 1951, a group of southern rail

carriers, including the Southern, C. N. O. & T. P., Seaboard Airline, and a number of other railroads, published rates on pulpwood for general application both interstate and intrastate in southern territory based on the Roanoke Rapids scale plus 50 per cent. The ICC has instituted an investigation as to the lawfulness of these new rates, but it refused to grant an application of the Atlantic Coast Line and Louisville and Nashville Railroads that they be suspended pending the outcome of the investigation, and these rates are now actually in effect for movements over the railroads which have published them. These rates are lower than those authorized by the Tennessee Commission for intrastate application in Tennessee.

3. The Tennessee Commission, following extended hearings, has issued orders authorizing the petitioning carriers to increase their Tennessee intrastate rates in the same percentages and amounts as were authorized by the ICC in Ex Parte 166 for southern territory interstate rates except in the case of certain commodities as to which the railroads themselves did not seek the full interstate increases, a few others on which there has not been shown to be any actual carload movements intrastate in Tennessee, and coal and wood. On coal, the Tennessee Commission authorized increases of 10 per cent in lieu of the 20 per cent authorized interstate by the ICC, subject to the same 40 cents per net ton maximum authorized interstate by the ICC. On wood, it authorized 15 per cent in lieu of the 25 per cent authorized interstate by the ICC.

4. In a later case known as Ex Parte 168, the ICC ordered further increases in southern territory interstate rates of 10 per cent, subject to certain exceptions and maxima with respect to particular commodities. Thereafter, on petition of the rail carriers operating in Tennessee, the Tennessee Commission, after hearing, granted for intrastate application in Tennessee increases 10 per cent over the then existing rates which is the percentage granted by the ICC in Ex Parte 168, but then again refused to authorize increases in coal and wood rates corresponding fully to those authorized by the ICC in Ex Parte 166 proceeding.

5. On November 2, 1950, the rail carriers operating in Tennessee petitioned the ICC under Section 13(4) of the Interstate Commerce Act for an order requiring, in substance, that Tennessee intrastate coal and wood rates be increased by the amounts necessary to reflect the same percentage increases as the ICC had authorized in Ex Parte 166 for interstate application in southern territory.

6. A hearing was held on the petition of the rail carriers on March 7, 8, and 9, at Nashville, Tennesse, before ICC Examiner Andrew C. Wilkins. At the hearing, the carriers withdrew any request for increases in coal rates to Nashville and Old Hickory, Tennessee, and to intermediate points taking the same rates, to all of which points the carriers had voluntarily reduced rates below the level authorized by the Tennessee Commission. Corresponding reductions were also made from interstate mines to these destinations. Thereafter the Examiner issued a proposed report in which he found that no increases should be ordered by the ICC in Tennessee intrastate rates on coal or wood.

7. On May 19, 1952, following the filing of exceptions to the Examiner's proposed report and oral argument, the ICC, Commissioner Splawn dissenting, issued a report finding those Tennessee intrastate rates on coal and wood (except the rates to Nashville, Old Hickory, and intermediate points and the pulpwood rates of the Southern Railway and C.N.O. & T.P. Railroad) to be violative of Section 13 (4) of the Interstate Commerce Act. It thereafter, on August 19, 1952, issued an order denying petitions for reconsideration and directing the carriers to put into effect new intrastate rates on coal and wood reflecting the same increases as those previously granted by the ICC in intrastate rates on those commodities. The ICC excepted from its order rates on coal to Nashville, Old Hickory and intermediate points taking the same rates. As to pulpwood, the ICC excepted from its order the rates of the Southern and the C.N.O. & T.P., which rates are below the level authorized by the Tennessee Commission.

8. The railroads operating in Tennessee thereafter published tariff supplements under which the increases ordered by the ICC would have become effective October 25, 1952.

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The Tennessee Commission, on October 10, 1952, instituted the present action seeking to enjoin and set aside the ICC's report of May 19, 1952, and order of August 19, 1952. The United States of America adopted a neutral position with respect to the complaint. The Tennessee Valley Authority intervened in support of the complaint. The rail carriers, the ICC, and some of the Kentucky coal operators intervened in opposition to the complaint.

* * * * *

The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:

> 9. "1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the other hand, and the adjoining States in southern territory, on the other."

This finding of the Commission is supported by the evidence (Tr. 32-56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I. C. C. 513, 623; Southern Cement Rates, 132 I. C. C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I. C. C. 731; Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646.

> 10. "2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable."

Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I. C. C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I. C. C. 9, 113.

> 11. "3. As to coal, there is active competition between persons and localities engaged in interstate commerce

between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other."

The above finding is supported by the evidence cited on pages 47-55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I. C. C., pages 11-14, 18-22, 23-29, 38-42.

12. "4. The intrastate rates and charges in Tennessee on chemical, acid, pulp and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce."

Finding No. 4 is supported by Findings Nos. 1, 2, 3, and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I. C. C. 45-46, 58, and Appendix B) and will be found in the record, Tr. 330-403.

13. "5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States: provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the correspond-

ing interstate rates on pulpwood maintained by the same carrier to or from Tennessee points."

Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

14. "6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues."

Finding No. 6 is supported by the evidence, 286 I. C. C. 44-45, 55, 58-59; Tr. 8-9, 114-115, 134-135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I. C. C. 44).

15. "7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce."

The findings of the Commission also included a saving clause reading as follows:

"These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act."

The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole.

Conclusions of Law

1. The Court concludes that it has jurisdiction of this suit under Sections 1336, 2284 and 2381-25 of Title 28 of the United States Code and Section 17(9) of the Interstate Commerce Act (49 U. S. Code, 17.9).

2. The Court concludes that the Interstate Commerce Commission had jurisdiction to enter the order complained of under Section 13 of the Interstate Commerce Act (49 U. S. Code, Section 13).

Wisconsin RR Commission v. CB&QR, 257 U. S. 563.

3. The findings of the Interstate Commerce Commission are adequate to support the challenged order of the Commission.

U. S. v. Louisiana, 290 U. S. 70; King v. U. S., 344 U. S. 254, 97 Law Ed. (Adv. page 207).

4. The Court concludes that the Commission order is valid, being supported by adequate findings based on substantial evidence; that the application for an injunction should be denied, and the complaint should be dismissed.

Judgment accordingly.

(S.) JOHN D. MARTIN,
United States Circuit Judge.
(S.) ELMER D. DAVIES,
United States District Judge.
(S.) MARION S. BOYD,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil No. 1595

STATE OF TENNESSEE, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant*

FINAL JUDGMENT

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges con-

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vened pursuant to 28 U.S.C. 2284(1), and 2325, upon an application for an interlocutory and a permanent injunction; and being heard and considered upon the full record of the proceedings before the Interstate Commerce Commission as well as upon arguments and briefs of counsel; and the cause having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which have heretofore been filed:

Now, therefore, upon the basis of such findings of fact and conclusions of law, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied, that the suit be dismissed, and that costs be taxed against the plaintiffs.

This the 31st day of July, 1953.

Approved as to form:

(S.) JOHN D. MARTIN,
United States Circuit Judge.
(S.) ELMER D. DAVIS,
United States District Judge.
(S.) MARION S. BOYD,
United States District Judge.

(S.) ALFRED T. MACFARLAND,
(S.) SAMUEL R. HOWELL,
Atty. for I.C.C.
(S.) CHARLES P. REYNOLDS,
(S.) JAMES A. BISTLINE,
(S.) WILLIAM H. SWIGGART,
(S.) PRIME F. OSBORNE,
Attys. for Intervenor R.R.
(S.) ROBT. E. WEBB,
Atty. for Kentucky Coal Agency.
(S.) JOSEPH S. SWIDLER,
Tenn. Valley Authority.

APPENDIX "B"

REPORT OF THE INTERSTATE COMMERCE COMMISSION

No. 30720

TENNESSEE INTRASTATE RATES AND CHARGES

Submitted March 19, 1952. Decided May 19, 1952.

1. Tennessee intrastate rates and charges on coal and wood found to cause unjust discrimination against interstate commerce, and as to coal, undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

2. Tennessee intrastate rates on agricultural slag, alfalfa meal, brick (fire or paving), phosphate rock, and sand (except common), found not shown to cause undue or unreasonable advantage, preference, or prejudice, nor unjust discrimination against interstate or foreign commerce.

Charles Clark, Frank W. Gwathmey, Y. D. Lott, Jr., W. A. Northcutt, Earle J. Zoll, Jr., M. T. Hastings, L. L. Oliver, Chas. P. Reynolds, C. S. Blackman, L. C. Bruce, H. L. Haines, P. E. Geil, and Elias Lyman, Jr., for respondents.

D. S. Browder, Roy Carson, W. L. Pedigo, William M. Maddox, and C. E. Widell for various shippers and other organizations supporting respondents.

G. Edward Friar and Hammond Fowler for Railroad and Public Utilities Commission of the State of Tennessee, protestant.

Joseph C. Swidler, Charles J. McCarthy, Robert H. Marquis, John C. Lovett and Sol Edidin for Tennessee Valley Authority, protestant.

W. W. Glenn, L. A. Gossage, J. Walter Harding, Thomas L. Howard, F. F. Kator and L. R. Steinback for shipper, protestants.

JOHNSON, *Commissioner:*

Exceptions to the report proposed by the examiner were filed by the respondents and other parties, replies were

made, and the issues were argued orally before us. Our findings and conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In response to a petition by 14 rail carriers operating in the State of Tennessee, this investigation was instituted by our order of December 4, 1950, to determine whether the rates [1] and charges of such carriers, or any of them, operating in Tennessee for the intrastate transportation of property made or imposed by authority of the State of Tennessee, cause or will cause, by reason of the failure of such rates and charges to include increases corresponding to those permitted by us for intrastate traffic in Ex Parte No. 166, *Increased Freight Rates, 1947*, 269 I.C.C. 33, 270 I.C.C. 81, 93, and 403; and Ex Parte No. 168, *Increased Freight Rates, 1948*, 272 I.C.C. 695 and 276 I.C.C. 9, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and to determine what rates and charges, if any, or what maximum or minimum, or maximum and minimum, rates and charges shall be prescribed to remove the unlawful advantage, preference, prejudice, or discrimination, if any, that may be found to exist. All common carriers by railroad operating within the State of Tennessee, subject to our jurisdiction, were made respondents,[2] and copies of the

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[1] Rates and charges are stated in amounts per 100 pounds, unless otherwise indicated, and do not include the general increases authorized in 1951.

[2] The principal respondents include the Carolina, Clinchfield and Ohio Railway, The Cincinnati, New Orleans and Texas Pacific Railway Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, and Tennessee Central Railway Company. These carriers will be referred to by their short titles.

order of investigation and notice of hearing were duly served upon them and upon the State of Tennessee.

In our final decision in Ex Parte No. 166, 270 I.C.C. 403, decided on July 27, 1948, we authorized, with certain exceptions, a general increase of 25 percent in the rates and charges of respondents and others in southern territory. Thereafter, on October 22, 1948, the respondents requested the Tennessee Commission to authorize these same increases in the intrastate rates and charges in Tennessee, and on March 11, 1949, the Tennessee Commission granted a general increase of 25 percent, to become effective not earlier than March 20 of that year, except that the increase was limited (1) to 10 percent on various commodities, including coal and coke, fertilizer, agricultural limestone, agricultural slag, brick, clay, sand, and cement; and (2) to 15 percent on wood, chemical, acid, pulp, and fuel. Following the issuance of our interim report in Ex Parte No. 168, 272 I.C.C. 695, the respondents, on April 2, 1949, requested the Tennessee Commission to grant the same increases as authorized therein, and again asked for the full amount of the increases previously requested on October 22, 1948. A hearing was held, but before the Tennessee Commission rendered its decision we issued our final report in Ex Parte No. 168 on August 2, 1949 (276 I.C.C. 9), wherein we authorized another general increase of 10 percent with certain exceptions, within southern territory. The respondents then filed an amended petition with the Tennessee Commission on September 22, 1949, requesting it to grant the full amounts of all increases in Tennessee intrastate rates and charges as authorized by us in interstate rates and charges in both Ex Parte Nos. 166 and 168. Pursuant thereto, the Tennessee Commission authorized a general increase of 10 percent to become effective not earlier than June 1, 1950, but subject to further and additional exceptions. The exceptions included the rates and charges on alfalfa meal by reducing the rating thereon from approximately 22.5 to 18.5 percent of the first-class rates, and on phosphate rock. The excepted commodities which were the subject of the hearing herein, together with the increases thereon authorized by us and by the Tennessee

Commission, are set forth in appndix A hereto. The increases authorized by us were made effective on interstate traffic to, from, and between points in Tennessee and, with few exceptions, are now in effect.

In the proposed report in this proceeding, which was served on November 21, 1951, the examiner recommended a finding that the Tennessee intrastate rates and charges should be increased to the same extent that the interstate rates and charges were increased with respect to agricultural limestone, cement, fertilizer, clay, and coke, and with respect to switching service on all of the commodities named in appendix A hereto. Following the filing of exceptions and replies thereto, the Tennessee Commission issued supplemental opinions and orders authorizing the respondents to establish the increases as recommended by the examiner. Accordingly, no further consideration will be given to the intrastate line-haul rates and charges on agricultural limestone, cement, fertilizer, clay, and coke or to the intrastate switching charges on any of the commodities named in appendix A.

Results of traffic study.—For the purpose of determining the losses sustained by respondents because of the failure of the Tennessee Commission to grant the full increases in the intrastate rates as authorized in the interstate rates, a traffic study was made. The study included both the intrastate and interstate movement of the excepted commodities terminated by six[3] of the respondents during three weeks in 1950. The weeks selected were April 3 to 8, as representative of late winter and early spring; July 17 to 22, as representative of mid-summer; and October 23 to 28, as representative of late fall and early winter. In making the selection no consideration was given to the relation of the weekly movement during those weeks to the movement during other weeks in the same months or during the other weeks of that year. The representative character of the weeks selected is supported by the fact that the tonnage terminated by the Nashville, Chattanooga & St. Louis,

[3] Nashville, Chattanooga & St. Louis, Southern (including the Cincinnati, New Orleans & Texas Pacific), Louisville & Nashville, Illinois Central, Clinchfield, and Gulf, Mobile & Ohio.

which has 72 percent of its mileage in Tennessee, averaged 3,190 cars per week during the weeks selected and its weekly average during the year 1950 was 3,029 cars.

During the test period the total number of cars of the excepted commodities terminated by the six respondents at Tennessee destinations following intrastate and interstate movements, respectively, were: Coal, 957 and 3,213; wood, chemical, pulp, fuel, 236 and 387; alfalfa meal, 0 and 1; brick, fire, paving, 0 and 43; phosphate rock, 0 and 21; sand, other than common, in closed cars, 0 and 17; and slag, agricultural, 0 and 27.

Based on the Tennessee intrastate movement during the test period of all of the commodities named in appendix A, projected on a yearly basis, the estimated losses sustained by the six respondents, due to their failure to secure the full intrastate increases as authorized on interstate traffic, were: Nashville, Chattanooga & St. Louis, $73,668.80; Southern, $222,078.84; Louisville & Nashville, $63,528.64; Illinois Central, $17,870.84; Clinchfield, $16,495.96; and Gulf, Mobile & Ohio, $19,587.88; or a total of $413,230.96. After eliminating the estimated losses in connection with agricultural limestone, cement, fertilizer, clay, and coke, and for intrastate switching, the respondents conclude that the losses on the remaining commodities were approximately $135,000.

The estimated losses shown above were determined by rerating the tonnage that moved intrastate in Tennessee during the test period to reflect the revenue that would have accrued if the full amounts of the increases authorized in Ex Parte Nos. 166 and 168 had been in effect at that time. This basis did not reflect any possible loss of intrastate movements of these commodities to trucks. Witnesses for respondents had given consideration to the possibility of diversion of this traffic to motor trucks and were of the opinion that any diversion of these particular commodities would be of little consequence. The witnesses were experienced and responsible traffic officials of respondents. One of the respondents conducts trucking operations through a highway subsidiary, blanketing most of its line of railroad of some 3,000 route-miles. The traffic manager

of this respondent, in addition to his railroad duties, participated for about 12 years in the development and management of the motor truck and bus operations of the highway subsidiary. Based upon his past experience, it was his opinion that the imposition of the additional increases here sought in the Tennessee intrastate rates on the excepted commodities would divert very little traffic to motor carriers, and would give respondents substantially increased net revenues.

Relative transportation conditions.—The Nashville, Chattanooga & St. Louis may be regarded as a typical Tennessee rail line insofar as transportation conditions are concerned. About 72 percent of its main-line mileage and approximately 78 per cent of its total branch-line mileage are located in Tennessee, the remainders being in Alabama, Georgia, and Kentucky. Although the same trains handle both interstate and intrastate traffic, the proportion of intrastate traffic handled in local freight trains in Tennessee exceeds that handled in through freight trains. The unit cost of handling a certain quantiy of freight for a given distance in local trains is greater than that of handling the same quantity for the same distance in through trains. The reason is that through trains are operated primarily for handling traffic moving between terminals, while local trains perform the switching in picking up and delivering cars at local stations, require more overtime in handling lighter tonnage for shorter runs, and must be made up and broken up at each terminal. The evidence supports the contention of respondents that the conditions at the time of the hearing fully substantiate the finding in *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, at page 646:

> That the conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than the conditions incident to the interstate transportation of freight in the South generally, that the greater part of Tennessee intrastate traffic is handled in local trains, and that the cost of handling intrastate traffic in local trains in Tennessee is greater than the cost of handling interstate traffic in through trains of the respondents.

Revenue needs of respondents.—In an effort to show their need for additional revenue, exhibits setting forth the financial condition of the principal respondents were introduced in evidence. The value of railway property used in transportation service, the net railway operating income, and the rate of return, after accrued depreciation, of the Southern, Cincinnati, New Orleans & Texas Pacific, Illinois Central, Gulf, Mobile & Ohio, Nashville, Chattanooga & St. Louis, Louisville & Nashville, and Tennessee Central for and between the years 1947 and 1949 are shown in appendix B hereto. None of the respondents, except the Cincinnati, New Orleans & Texas Pacific, earned as much at 5.5 percent in any of these years. The Nashville, Chattanooga & St. Louis and the Tennessee Central, which are primarily Tennessee lines, had the lowest earnings of any of these respondents. The Tennessee Valley Authority shows the earnings of these respondents both before and after deductions for federal income taxes. It takes the position that such taxes are not a proper charge to operations. This Commission and the courts have held otherwise. *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I. C. C. 41, and cases cited therein.

Increased cost of necessary materials and supplies, increased taxes, and the increased wages of their employees are given as the principal reason for respondents' need of additional revenue.

From 1947 to 1950 the unit cost of some particular commodities indicated some decreases but increases predominated. Taking the average unit cost of materials and supplies for the period 1935 to 1939 as 100 percent, the total increases in the unit cost from 1940 to 1950, inclusive, ranged from about 108 percent to about 148 percent. Taxes on unemployment insurance decreased due to a change in the rate from 3 percent to 1.5 percent by Act of Congress in 1947. Other taxes show an increase of more than 300 percent during the period 1940 to 1950. For the same period the average increase in the straight-time hourly rate and in the annual compensation per employee was over 100 percent.

Freight-train service operating statistics of the principal

respondents, for the period 1940 to 1950, support the contention of respondents that they are being operated efficiently. The record also shows that respondents have made considerable expenditures during the same period for improvement of their properties to increase the efficiency of their operations.

Protestants do not seriously question the need of additional revenue by respondents. The Tennessee Commission takes the position that if it had granted the full increases on the excepted commodities the additional diversion of their movement from the rails and the rail movement prevented by such increases due to use of substitute materials, would have decreased the total revenues of the rail-carrier respondents.

The evidence indicates that respondents are in need of additional revenue to maintain adequate and efficient railway transportation service over their lines.

Diversions to Intrastate routes.—When the rates between points in Tennessee were the same over intrastate and interstate routes there was little necessity for specific routing and shipments generally moved over the short routes. Following the refusal of the Tennessee Commission to grant the full amounts of the Ex Parte Nos. 166 and 168 increases in the intrastate rates, shippers began to route their shipments of the excepted commodities over intrastate routes to obtain the lower intrastate rates. Many of the intrastate routes are much longer than the interstate routes between the same Tennessee points. The record contains numerous illustrations. For example, from Cowan, Tenn., to Cleveland, Tenn., the distance is 92 miles over the short interstate route and 359 miles over the short intrastate route. At the time of the hearing the intrastate rate on cement from Cowan to Cleveland was 20 cents, and the interstate rate sought was 22 cents. The use of the intrastate routes by shippers to obtain the lower rates not only diverted traffic from the normal interstate routes but resulted in the additional burden of increased cost of handling the traffic over the longer routes. Respondents were thereby deprived of the benefit of the full measure of the ex parte increases and were required to furnish additional and unnecessary

service in transporting the traffic over the longer routes. The diversion of shipments of the excepted commodities from normal interstate routes to the longer intrastate routes became so serious that 12 of the respondents amended their tariffs to apply the intrastate rates as maxima over interstate routes between Tennessee points between which there are both intrastate and interstate routes.

Coal. In Tennessee coal deposits are widely scattered. Numerous bituminous coal mines are operated from the vicinity of Chattanooga northeastward along Waldens Ridge and the Cumberland Plateau beyond Knoxville to the East Tennessee-Kentucky border. Coal mines are also operated across that border in eastern Kentucky, and in nearby Virginia and in the western part of Kentucky. Many of the mines are served by short rail lines and branch lines of the larger rail carriers. A number of the mines are not located on rail lines and are served only by motor trucks.

In Jellico, Tenn., and Middlesboro, Ky., mine groups embrace mines in both Tennessee and Kentucky, which are served by two different branch lines of the Southern. A number of the mines in these groups are also served by the Louisville & Nashville. Shipments from some of the Tennessee mines in these groups must move over interstate routes to Tennessee destinations. Normally the rates from all mines in a group to common destinations are the same over both interstate and intrastate routes. Due to the failure of the Tennessee Commission to permit the full increases in the intrastate rates, the operators who can ship over intrastate routes have a rate advantage over their competitors who must pay the higher rates over interstate routes from Tennessee mines to destinations in Tennessee.

Coal mines in Tennessee north and west of Knoxville include the Glen Mary, Petros, Lake City, Pioneer, and Monterey groups. Many of these mines are served by short rail lines such as the Brimstone Railroad Company, the Oneida & Western Railroad Company, the Emory River Railroad Company, and the Tennessee Railroad Company. The Tennessee Central serves a number of the mines. Some of the coal mines north and west of Chattanooga are the

Tracy City and Palmer mines on the Tracy City branch, and the Pikeville and Whitwell mines on the Pikeville branch, of the Nashville, Chattanooga & St. Louis. Coal from mines on the Tracy City branch to Tennessee destinations can move over intrastate routes, but from the mines on the Pikeville branch the shipments must move over interstate routes.

Competition between the various groups of mines is keen in the sale of their coal in common markets. Tennessee mines must also meet the competition of the coal from mines in Kentucky, Virginia, West Virginia, Alabama, and Illinois. An extensive rate structure based on differential rates from the various competing groups of mines to common markets was begun by the rail carriers more than 50 years ago. Although new mines have been opened as old ones became exhausted, and changes have occurred in prices and markets for coal, the differential rate pattern in this area remained relatively constant from about 1907 to 1946. As indicated in *Stearns Coal & Lbr., Inc.* v. *Aberdeen & R. R. Co.*, 216 I. C. C. 789, the differential between the East Kentucky and East Tennessee groups was 10 cents per ton between 1907 and 1920. Under the general increases of 1920 it became 12.5 cents and was reduced to 11 cents under the general reductions of July 1, 1922. In the decision cited the Stearns Coal & Lumber Company assailed the differential as unduly prejudicial to its mines in eastern Kentucky and unduly preferential of competing mines in eastern Tennessee as applied to shipments of coal to the South, but division 4 found to the contrary and dismissed the complaint. The normal differentials have been successively disturbed by the general increases authorized in Ex Parte Nos. 162, 166, and 168. The manager of the Chattanooga branch of the Stearns Coal & Lumber Company testified in this proceeding to the effect that the differential between that company's mines in eastern Kentucky and the Glen Mary group in eastern Tennessee has now become 32 cents per ton, which has resulted in the loss of sales of coal in Chattanooga The witness referred to the loss of the sale of 1,200 tons bought by the City of Chattanooga from the Glen Mary mines in 1951. On cross-examination this witness admitted that coal

movement in trucks to Chattanooga had increased some, that natural gas had been installed in 1950, and that his company had not sold any substantial amount of coal to the City of Chattanooga since 1944 or 1945.

The vice-president and traffic manager of the Kentucky & Tennessee Railway which serves the mines of the Stearns Coal & Lumber Company in the Pine Knot group of Kentucky, testified that the mines on the short rail lines in the Glen Mary group constitute the real competition for the Kentucky & Tennessee Railway mines. From its connection with the Cincinnati, New Orleans & Texas Pacific at Stearns, Ky., the Kentucky & Tennessee operates 19.68 miles of main line serving four major coal-mine operations with normal production of 800,000 tons annually. The normal differentials in the rates from mines in the Pine Knot group is 11 cents per ton over those in the Glen Mary group to points in Tennessee and south. Due to the general increases and the failure of the Tennessee Commission to permit the full increases in the intrastate rates, this differential has been increased to as much as 35 cents per ton to certain destinations. This short line contends that the effect of this discrimination against interstate commerce has been considerable curtailment of the movement of coal from the mines on this line.

To 50 destinations in Tennessee the mines on the Kentucky & Tennessee shipped 222,427 tons of coal in 1947, 160,106 in 1948, 91,532 in 1949, and 80,983 in 1950. To some of the larger markets in Tennessee the tonnage figures in 1947 and 1950, respectively, were 78,659 and 23,951 to Chattanooga, 39,145 and 19,355 to Nashville, and 34,946 and 4,808 to Harriman. The mines on this short line shipped 6,897 tons to Oak Ridge in 1947 and none since, and the tons shipped to Watts Bar Dam were 3,849 in 1947 and 655 in 1950. It was admitted that the fuel-generating plant at the atomic-energy installation at Oak Ridge had been converted to the use of natural gas, but that installation still uses some coal which is obtained at mines nearer than those on the Kentucky & Tennessee. The witness for the Kentucky & Tennessee considers the restoration of the normal differential as necessary if the coal mines on that line are to con-

tinue in business, which is vital to the very existence of that carrier. If the increases here sought in the Tennessee intrastate rates were made effective, the differential would be only slightly higher than the normal differential.

The normal differential in the rates on coal from the western Kentucky mines to Memphis on June 30, 1946, was 10 cents per ton under the Tracy City and Whitwell Tenn., mines on the Nashville, Chattanooga & St. Louis north of Chattanooga. At the time of the hearing the rate from western Kentucky was 6 cents higher than the rate from the Tracy City mines, instead of the normal 10 cents under that rate, on traffic to Memphis. From the Whitwell mines the rate to Memphis was 11 cents higher than the rate from western Kentucky. This is due to the fact that coal from the Whitwell mines to points in Tennessee must move over interstate routes while traffic from Tracy City can move over either intrastate or interstate routes.

A witness for the large Palmer coal mine on the Tracy City branch of the Nashville, Chattanooga & St. Louis referred to the lower intrastate rate of $2.54 per ton from that mine to Columbia, Tenn., as compared with the rate of $2.75 per ton from western Kentucky mines to the same destination. The lower intrastate rate is due in part to the failure of the Tennessee Commission to permit the full increases in those rates. Although the Palmer mines would like to keep the lower rate, the witness indicated that they realize it is not a fair adjustment and that they were more vitally interested in a stable adjustment by restoration of the normal relation between competing groups which had been disrupted by the action of the Tennessee Commission. This witness, who also represented the Tennessee Manufacturers Association and various Tennessee industrial interests, supported in general the increases here requested by respondents. Aside from the strenuous objections voiced by a witness representing the western Kentucky coal producers to the discrimination against them, this is an example of the discrimination by one group of Tennessee mines shipping on intrastate rates against another group of Tennessee mines shipping on interstate rates to the same Tennessee

market, due to the failure of the Tennessee Commission to permit the full increases in the intrastate rates.

Another witness for the western Kentucky coal producers showed that their coal shipments to Memphis declined from 109,828 tons in 1948 to 67,690 tons in 1949 and to 60,925 tons in 1950. This was not due to lack of production as there were 700 cars of coal on the tracks unsold at the time of the hearing. Memphis is so situated that its rates on coal from certain mines in Alabama, western Kentucky, and Illinois are the same. This witness attributed the loss of tonnage to an increase in shipments of coal from the competing mines and the lower intrastate rates from Tennessee mines. On cross-examination he expressed the opinion that the major factor was gas competition. Coal shipments from mines in western Kentucky to the entire State of Tennessee declined from 1,425,893 tons in 1948 to 1,064,186 tons in 1949, and to 1,027,779 tons in 1950. Admitting that competition from other producers and gas had accounted for some of the loss, the witness insisted that the lower intrastate rates in Tennessee which had disrupted the rate structure were a very vital factor in the movement of coal.

The Harlan County Coal Operators Association, composed of operators of coal mines in Harlan and Bell Counties, Ky., and the Hazard Coal Operators Association, composed of operators of coal mines in Perry, Letcher, and Knott counties, Ky., were represented at the hearing by their traffic manager. The members of these associations produce both domestic and steam coal in the southeastern part of Kentucky. They ship to destinations throughout the State of Tennessee in active competition with coal mines and producers in Tennessee. The primary interest of these southeastern Kentucky coal producers in this proceeding is the relation of their rates with those of their competitors in the Tennessee markets. Their secondary interest is the level of the rates. To some Tennessee Markets their differential over competing Tennessee mines has increased as much as 39 cents a ton since 1946. Of this amount, 17 cents is the result of the general percentage increases and 22 cents is the result of the failure of the Tennessee Commission to permit the full amount of those increases in the intrastate

rates. Restoration of the normal differentials is most important to these coal producers to again place them on a fair basis with their Tennessee competitors who now ship on the lower intrastate rates. They have presented the matter of restoration of the normal differentials before the carriers and progress has been made, but final restoration cannot be brought about until the intrastate rates are placed on the same basis as the interstate rates.

Most of those who oppose any further increase in the Tennessee intrastate rates on coal are coal dealers and associations of dealers in Chattanooga and in the Nashville area, including Old Hickory, Tenn. These include the Chattanooga Coal and Coke Dealers Association, the Coal Heating Service of Chattanooga, the Rossville Coal and Supply Company of Chattanooga, the Nashville Coal Company with producing mines in western Kentucky, the Nashville Coal Heating Service, the Progressive Coal Company of Nashville, the Nashville Coal Institute, and the Fentress Coal & Coke Company with office at Nashville and mines near Monterey. In addition to these, the increase sought is opposed by the Tennessee Coal Company and the A.B.C. Coal Company of Monterey, and the Tennessee Valley Authority which operates a number of steam-generating plants at hydro-electric dams on navigable streams in Tennessee.

During the past few years the tonnage handled by these coal dealers has been declining and they believe that any further increase in the coal rates will result in additional losses. The losses have been due in part to the increases in the price of coal and in the growing use of electricity, oil, and gas. The use of gas has not been confined to the heating of residential units. Some of the large office buildings and industrial plants, particularly in the Nashville area, have been converted to the use of natural gas. For example, a large industrial plant at Old Hickory formerly used coal entirely to meet its fuel needs. One of the coal dealers at Nashville who had sold a substantial amount of coal to this plant was informed that unless lower rates on coal could be obtained consideration would be given to the use of natural gas. This dealer conferred with representatives of the rail carriers over a period of about 12 months

in an effort to retain this coal business by securing a reduction in the rail rates. His efforts were unsuccessful and the plant was converted to the use of natural gas to the extent of about two-thirds of its fuel needs. Thereupon, the Tennessee Central reduced its rate on coal from the Monterey district to Old Hickory in the amount of about 50 cents per ton, which it is hoped will result in retaining the balance of the fuel needs of that plant for coal. This reduction had the effect of reducing the intrastate rate on coal below the level authorized by the Tennessee Commission, and counsel for the respondents stated that no increase is sought in the rate to Old Hickory.

Most of the coal used in the Nashville area comes from the western Kentucky mines. After the carriers applied the increases authorized by us in Ex Parte No. 168 the rate from those mines to Nashville became $2.24 per net ton. The same rate became applicable from the Whitwell mines on the Nashville, Chattanooga & St. Louis, as the shipments from such mines must necessarily move over an interstate route through Alabama, but from the Palmer mines served by that carrier the rate to Nashville became $2.06 per net ton by reason of the lower increases authorized by the Tennessee Commission. Because of the additional use of natural gas in the Nashville area, the rate to Nashville from all of these mines was reduced to $2 per net ton in the latter part of 1950, and the rates from other mines in Tennessee, Kentucky, and Virginia were reduced on a comparable basis. Accordingly, the respondents are not here seeking any increase in the rates on coal to Nashville or to points intermediate thereto where the rates were reduced to the same extent as to Nashville.

Producers of coal on the Tennessee Central have lost some of their usual Tennessee markets to producers in western Kentucky. The mining costs in western Kentucky are lower than in Tennessee and the western Kentucky operators are therefore able to absorb some of the higher interstate freight charges so as to sell in Tennessee in competition with Tennessee coal which moves on lower intrastate rates. The wage scale in Kentucky is said to be less than in the Monterey district, and the Kentucky mines are highly mech-

anized while the conditions in the Tennessee mines make mechanization impractical. Witnesses for operators of mines in the Monterey district testified that when shipments move by rail it is necessary to haul the coal in trucks for about 5 miles where the rail cars are loaded by the use of ramps. At the time of the hearing the price per ton of stoker coal f.o.b. mines was $8 in eastern Tennessee and $7.50 in eastern Kentucky and Alabama. To Chattanooga the rate per net ton was $2 intrastate and $2.32 interstate from eastern Tennessee, $2.52 from eastern Kentucky, and $2.90 from Alabama.

As a result of the rationing of gasoline and tires during World War II, the transportation of coal by truck from mines not served by rail lines but within trucking distance of markets was considerably curtailed. With the removal of rationing restrictions and the increases in rail rates, the hauling of coal by trucks has increased substantially. For example, there are numerous mines within 25 miles of Chattanooga which are not served by rail lines, and at the time of the hearing the trucks were hauling about 100,000 tons of coal per year into that city. It was estimated that this movement would be increased by about 50 percent if the increases sought became effective. However, there is still a substantial amount of coal which moves to Chattanooga by rail. For example, during the three-week test period the Southern transported to Chattanooga 188 carloads under intrastate rates and 169 carloads under interstate rates.

The Tennessee Valley Authority operates its steam-generating plants at the hydro-electric dams when the stream-flow conditions are poor, and for this purpose many thousands of tons of coal are used annually. The plants are so located and equipped that they receive shipments by rail, truck, and barge. The plant at Watts Bar, for example, is located on the Tennessee River about midway between Knoxville and Chattanooga. Rail shipments thereto are terminated at Spring City, Tenn., and switched thence to the plant by the Cincinnati, New Orleans & Texas Pacific under a special contract. During 1950 the Watts Bar plant received 38,522 tons of coal by truck, 92,911 tons by barge, and 437,328 tons by rail, the latter moving from Tennessee origins at

intrastate rates. The amount of coal shipped by rail to the Watts Bar plant during 1950 from interstate origins or at interstate rates is not shown, but the Southern terminated at Spring City 5 carloads (266 tons) during the three-week test period from two origins in Kentucky. The record indicates that the rail shipments were transported at the published tariff rates.

The contracts for the purchase of coal by the Tennessee Valley Authority are based on the price at the mines, and it pays the transportation charges to the plants, whether the shipments move by rail, truck, or barge. The cost of fuel approximated 80 percent of the total cost of operating the steam plants during 1950, and the intrastate freight charges on coal were about 23 percent of the total delivered cost of the coal. The Tennessee Valley Authority is concerned over any increase in such costs and the amount of any increases in the Tennessee intrastate rail rates may determine whether additional use will be made of trucks and barges in transporting coal to its plants in the future, or whether additional use will be made of other fuels.

Some of the plants of the Tennessee Valley Authority which formerly used coal have been converted to the use of gas. The plant at Memphis uses gas and oil. The burners at the Watts Bar plant are equipped to use gas but the natural gas-transmission line is about 20 miles therefrom. A new plant at Johnsonville, Tenn., on the Tennessee River about 80 miles west of Nashville, was expected to be completed and in operation in October 1951. The coal requirements for this plant are estimated to exceed 2 million tons a year. Of the amount of coal used during 1950 at the steam plant at Hallsborough, Tenn., located on the Tennessee River about 20 miles west of Chattanooga, 6,875 tons moved by rail (terminated at Ladds, Tenn.) and 101,310 tons moved by truck. Most of the coal used at this plant is obtained at mines in the vicinity thereof. During 1950, 23 percent of all coal used at the various steam plants in Tennessee was purchased at points in Tennessee and moved intrastate.

In support of its contentions that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more

remunerative to the respondents than the interstate rates, the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June, 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions. The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as interstate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee Commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates.

The Tennessee Commission takes the position that if it had not restricted the increases from the high tide of all-time high freight rates on the excepted commodities, the trucks would have taken away so much of that traffic that interstate commerce would then have truly been burdened because the business would have been diverted from the railroads, and the total revenues of the respondents would have decreased. The chairman of the Tennessee Commission appeared as a witness and referred to the widely-diversified resources of the State of Tennessee and its many peculiar problems and local situations. He expressed the view that the Tennessee Commission "is entitled to have reasonable leeway and latitude in determining local conditions and the impact of these local conditions and local situations upon intrastate freight charges." It is the judgment of that Commission that the restrictions which it placed upon the increases on the excepted commodities

resulted in a level of rates which are not burdensome on interstate commerce but are good business for the rail carriers.

All of the parties, including the respondents, agree that there is keen competition between coal and other fuels, particularly natural gas, at certain points in Tennessee, and that the delivered cost of coal, including the freight charges, may determine whether coal or some other fuel will be used. This is demonstrated by the previously-mentioned reductions in the rail rates to Old Hickory and Nashville. There is likewise competition between the transportation agencies, rail, truck, and barge, but it is apparent that all of this competition affects the interstate movement of coal as well as the intrastate movement. Responsible officials of the respondents who have considered these matters insist that the increases sought will result in substantial increases in their revenues on coal.

As hereinbefore indicated, many of the parties are seriously concerned with the disruption of the normal relationship in the rates from one group of mines as compared with those from other groups, and some of them contend that the action of the Tennessee Commission has created an artificial barrier against the interstate transportation of coal. The action of that Commission not only resulted in a serious disruption of the normal relationship in the rates from the various groups, but in some instances disrupted the rates from mines in the same group. For example, to Chattanooga the rate from mines on the Kentucky & Tennessee Railway was 11 cents per ton higher than the rate from mines on the Tennessee Railroad prior to the Ex Parte No. 166 increases. If the Tennessee Commission had authorized the same increases from mines on the Tennessee Railroad which we authorized in Ex Parte Nos. 166 and 168 from mines on the Kentucky & Tennessee Railway, the difference in the rates from these respective mines, after the application of such increases, would have been 14 cents, but because of lower increases authorized by the Tennessee Commission the difference became 32 cents. Similarly, to Chattanooga the rate from all mines in the Jellico group was $1.76 per ton prior to the Ex Parte No.

166 increases. Some of the mines in the Jellico group, including Jellico and Clairfield, are located in Tennessee and others, including Fonde, are located in Kentucky, and shipments from Clairfield must move for a short distance through Kentucky. After the increases authorized by us in Ex Parte Nos. 166 and 168 were established, the rate from Clairfield and Fonde to Chattanooga became $2.32 per ton, but the lower increases authorized by the Tennessee Commission resulted in a rate of $2.13 per ton from Jellico.

Wood.—The rates in southern territory on chemical, acid, pulp, and fuel wood are generally on the bases of distance scales. Most of the rates on pulpwood in the South have been based on the so-called Roanoke Rapids scale, which was established by the Seaboard Air Line Railroad Company in 1909 for single-line movements to Roanoke Rapids, N. C. Some of the rates on pulpwood are based on other scales, a few of which are lower and others are higher than the Roanoke Rapids scale as modified by the various rate increases.

As a result of the limited increases authorized by the Tennessee Commission, the Roanoke Rapids scale of rates on pulpwood in Tennessee ranges from 15 to 72 cents per cord of 128 cubic feet lower than the scale generally applicable on interstate movements in southern territory.[4]

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[4] At the time of the hearing herein, the Southern, including the Cincinnati, New Orleans & Texas Pacific, and the Seaboard had under consideration a proposal to establish a uniform scale of rates on pulpwood for single-line movements over their lines between all points in the South to apply on both interstate and intrastate traffic. The proposal was to use the basic Roanoke Rapids scale in effect on March 27, 1938, increased by 50 percent. This uniform scale was established by these and certain other carriers on November 1, 1951, which, for their account, had the effect of reducing the interstate rates, and the intrastate rates in Alabama, Florida, Louisiana, Mississippi, and Tennessee, and of increasing the intrastate rates in Georgia, North Carolina, South Carolina, and Virginia. By order dated January 2, 1952, division 2 of this Commission instituted an investigation into the lawfulness of so-called uniform rates, but since the interstate and the intrastate rates of the Southern, including the Cincinnati, New Orleans & Texas Pacific, to and from points in Tennessee are on the same basis no further consideration will be given here to such rates. The other respondents insist, however, that they need and are entitled to the increases sought herein.

The Nashville, Chattanooga & St. Louis scale, which applies on all kinds of wood, ranges from 8 cents per cord higher to 76 cents per cord lower than the interstate pulpwood scale, and from 23 cents per cord higher to 14 cents per cord lower than the Roanoke Rapids pulpwood scale within Tennessee.

As a result of general increases authorized by us, including the increases authorized in Ex Parte Nos. 166 and 168, the cumulative total increase in the basic Roanoke Rapids scale of rates since March 27, 1938, is 81.5 percent on interstate movements of pulpwood in the South. Since that same date the increases permitted by the various State authorities in the South have resulted in cumulative increases in intrastate rates of 67.9 percent in Mississippi, 65 percent in Alabama, Florida, and Louisiana, 59.4 percent in Tennessee, 44 percent in Georgia, 32 percent in North Carolina, 31.9 percent in Virginia, and 19.9 percent in South Carolina. If the increases here sought are granted, the cumulative increase in Tennessee will become 73.3 percent. These figures, of course, do not take into consideration the so-called uniform scale of rates described in footnote 4 which have been established by various carriers.

A consumer of extract or acid wood and pulpwood with plants at Kingsport, Harriman, Nashville, and Knoxville, Tenn., and at Sylva, N. C., Bristol and Lynchburg, Va., and Brunswick and Macon, Ga., opposes the increases sought in the Tennessee intrastate rates on wood. The mill at Kingsport produces white paper in competition with another mill at Canton, N. C., which produces the same grade of paper. The other Tennessee mills produce pulpboard in competition with other producers in the South. In the manufacture of these products wood is the most important raw material used and moves in the greatest volume. About two cords of wood weighing from four to five tons are required to produce one ton of pulpboard. In 1950, the four mills in Tennessee consumed about 127,000 cords of wood. Of this amount only 29 percent moved over intrastate routes. One reason for this is that Tennessee is not a heavy producer of the low-grade wood used by paper mills. Another reason is that many intrastate shipments

require handling over joint-line routes at charges based on the combination of local rates.

The Tennessee intrastate rates per cord on pulpwood are compared by this protestant with the intrastate rates in North Carolina, South Carolina, and Georgia. As examples, from Erwin, Tenn., to Kingsport, 43 miles, the intrastate rate is 188 cents. From Ela, N. C., to Canton, 43 miles, the intrastate rate is 149 cents. From Tuggle, Va., to Lynchburg, 44 miles, the intrastate rate is 149 cents. From Ludowici, Ga., to Savannah, Ga., 46 miles, the intrastate rate is 163 cents, and from Pregnall, S. C., to Charleston, S. C., 42 miles, the intrastate rate is 135 cents. Intrastate rates per cord in Tennessee on extract or acid wood are compared with the intrastate rates in North Carolina and Virginia. As examples, from Elverton, Tenn., to Knoxville, 43 miles, the rate is 135 cents. From Ela to Canton, 43 miles, the rate is 103 cents, and from Tuggle to Lynchburg, 44 miles, the rate is 132 cents. These comparisons, however, do not take into consideration the recent changes in the rates on pulpwood made by the southern and other carriers. Moreover, it is noted that, with the exception of Knigsport and Nashville, all of the points at which this protestant maintains plants are served by the Southern.

Prior to the more recent general rate increases this protestant did not move any appreciable amount of wood to its Tennessee mills by motor truck. In 1950, it received approximately 2,200 cords of wood by truck at Knoxville, and from January 1 to February 15, 1951, about 1,500 cords were received by truck. It was anticipated that during the remainder of 1951, an additional 7,500 cords would be moved by truck to Knoxville. As indicated, however, Knoxville is served by the Southern which has recently reduced its interstate and intrastate rates on pulpwood and is not here seeking an increase in such rates.

A producer of charcoal, pig iron, and specialty foundry iron operates a large hardwood distillation plant at Lyle, Tenn., located on a branch line of the Nashville, Chattanooga & St. Louis about 12 miles south of its main line west of Nashville. By highway the plant is about 40 miles directly west of Nashville. The distillation plant uses

about 80 thousand cords of oak, maple, beech, gum, or other hard woods a year. This user of hardwood has found that it can get its wood delivered at the plant from the wood cutters by truck for the same cost as it has paid for movement from the forest to the rail head and rail movement thence to the plant. A witness for this producer was of the opinion that if the increases here sought had been in effect probably half of the shipments which moved by rail to its plant during the test period would have moved by truck.

As stated, all of the respondents except the Southern and the Cincinnati, New Orleans & Texas Pacific, contend that the increases sought in the Tennessee intrastate rates on wood would result in substantial increases in their revenues even though some of the traffic might be diverted to trucks. During the three-weeks test period, the Clinchfield, for example, transported to Kingsport 110 carloads of pulpwood over interstate routes and 67 carloads over intrastate routes. The record does not show the movement, if any, of wood to Kingsport by other means of transportation. If the increases sought had been applied on the 67 shipments, additional revenue in the amount of $600.24 would have been realized, and on a yearly basis the amount would have been $10,404.16.

Other commodities.—The record indicates that agricultural slag, fire and paving brick, and sand, other than common and shipped in closed cars, are not produced at points in Tennessee. Alfalfa meal is produced in the Tiptonville, Tenn., area and phosphate rock is produced in the Mount Pleasant, Tenn., area. The respondents, however, failed to show any movements of these commodities over intrastate routes in Tennessee. Consequently, they failed to show that an increase in the rates on these commodities would result in substantial increases in their revenues, or that there is any discrimination between the interstate and the intrastate rates thereon.

General discussion and conclusions.—The need of the railroads for additional revenue to meet increased expenses was the underlying basis for the increases authorized by us in Ex Parte Nos. 166 and 168, and the increased

expenses were not confined to interstate traffic, but were and are incurred also to intrastate traffic, including that in Tennessee. It was realized, of course, that the carriers would not be able in all instances to take full advantage of the increases authorized in those proceedings because of competitive or other peculiar conditions. This is demonstrated by the fact that the respondents have reduced the interstate and intrastate rates on coal to Nashville and the intrastate rates on coal to Old Hickory to a basis below that authorized by the Tennessee Commission because of competition with natural gas. The evidence is convincing, however, that the increases sought by the respondents on coal to other destinations in Tennessee and on chemical, acid, pulp, and fuel wood would result in substantial increased revenue which the respondents need to meet increased operating costs. The record indicates that the intrastate movement of such traffic is no less able to bear the increases sought than the interstate movement thereof from, to, and through Tennessee. To the extent that such intrastate traffic fails to bear its fair proportionate share of the increased operating expenses by providing additional revenue commensurate with that provided on such interstate traffic, it places an undue burden upon interstate commerce.

As to coal, the record also warrants the determination that some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce.

We conclude that:

1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.

2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.

3. As to coal, there is active competition between persons

and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.

4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.

6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.

7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce.

These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or

any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order carrying into effect the foregoing findings and conclusions will be entered, unless we are notified by the Tennessee Commission, within 30 days from the date of the service of this report, that it will promptly permit the increases herein approved.

SPLAWN, *Commissioner*, dissenting in part:

I disagree with this report to the extent that it requires respondents to apply to the intrastate rates on coal and wood "the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States."

For reasons discussed below, these findings, in my judgment, disregard the well-settled principles: (a) that the power of this Commission under section 13(4) of the Act to require increases in intrastate rates is dominant only so far as necessary "to alter rates which injuriously affect interstate transportation" within the meaning of that section; and (b) that when, as here, the Federal power is exerted for the purpose of nullifying State-prescribed rates, the justification for the exercise of that power must clearly appear. *North Carolina* v. *United States*, 325 U. S. 507, 511, and the several cases there cited.

The finding that the present intrastate rates on coal result in undue prejudice and preference apparently rests upon the preliminary finding, immediately preceding the numbered findings, to the effect that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities in intrastate commerce. Neither the rates, the shippers, nor the localities which are involved in this stated unlawfulness are specifically identified. Such indefinite findings clearly do not justify the exercise of our power

under section 13(4) to require increases throughout the State of Tennessee. See *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 579, 580, and *Florida* v. *United States*, 282 U. S. 194. Presumably, therefore, this report relies primarily upon the finding of unjust discrimination against interstate commerce with respect to the rates on both coal and wood.

The findings of unjust discrimination against interstate commerce seem to rest mainly upon the need of respondents for additional revenue as disclosed in Ex Parte Nos. 166 and 168. Under the heading "General discussion and conclusions" this present report states that the increased expenses detailed in the Ex Parte proceedings were incurred on intrastate traffic in Tennessee as well as on interstate traffic, and the report then concludes that "the intrastate movement of such traffic is no less able to bear the increases sought than the interstate movement thereof from, to, and through Tennessee."

Contrary to the theory of this report, as I understand it, there is a clear distinction between our power to grant petitions of the railroads for general increases in their interstate rates based upon their judgment and expectations that increased revenues will result, and, on the other hand, our power under section 13(4) to overrule State authority and *require* precisely the same increases in the intrastate rates.

Our report in Ex Parte No. 168 (276 I. C. C. 9, 112) contains this statement:

> As previously shown, the cumulative effect of increases in rates already made and those now authorized may tend to diversion or suppression of traffic because exceeding the value of the service. The petitioners have represented that they are aware of this situation, and may be expected to protect their traffic and revenue therefrom by rate revisions necessary for the purpose.

It is protestants' contention, supported by adequate evidence I think, that the cumulative effect of the general increases reflected in the present intrastate rates has been to retard or prevent the movement of coal and wood, and that any further increases will result in substantially

greater diversion of this traffic from the rails because of competitive conditions peculiar to that State.

Coal deposits in Tennessee are widely scattered throughout the State. According to this record, there is keen competition between coal and other fuels, particularly natural gas at many points in Tennessee with the result that the delivered cost of coal, including the freight charges, often determines whether coal or some other fuel will be used. Additionally, there is keen competition for this traffic as between rail, truck, and barge transport agencies. These competitive conditions were partially recognized when respondents reduced their intrastate rates on coal from certain origins to Nashville and Old Hickory below the basis now authorized by the Tennessee Commission.

Apparently it is because of this action of respondents, that this report does not require any increases in the present intrastate rates on coal from any origins in Tennessee to Nashville and Old Hickory and intermediate points taking the same rates. But the report gives no satisfactory explanation of why other consuming destinations in Tennessee, similarly situated with respect to compelling competitive conditions, are not accorded the same rate treatment. For example, at the time of the hearing trucks were transporting about 100,000 tons of coal per year into Chattanooga and it was estimated that this movement by truck will be increased 50 percent as a result of the increases required by this report. In this connection, it is significant, I think, that this report contains no estimation of the increased revenue which respondents are expected to receive as a result of these increased intrastate rates on coal.

There is a well-established principle that carriers may not select from among their shippers those who are to be given an opportunity to ship in competition with other forms of transportation and those who are not. *Norcross Bros.* v. *Pennsylvania R. Co.*, 210 I. C. C. 629, 633, and 220 I. C. C. 407, 411. Our power to nullify State authority and require increases in intrastate rates should not be exercised so as to directly violate that principle, which is the result under the findings in this report.

Coming now to the finding that the present intrastate

rates in Tennessee on wood cause unjust discrimination against interstate commerce: As stated in footnote "4" in this report, effective November 1, 1951, many of the carriers in southern territory established a uniform scale of rates on pulpwood for application throughout that territory, on both interstate and intrastate traffic, including intrastate application in Tennessee over lines of the Southern and the Cincinnati, New Orleans & Texas Pacific. The stated purpose of this uniform scale was to prevent further diversion of traffic from the rails and to regain some of the traffic that had been lost to trucks.

This uniform scale, with broad application both interstate and intrastate throughout southern territory, is lower than the *present* intrastate rates in Tennessee over certain lines (excluding for example the Southern and the Cincinnati, New Orleans & Texas Pacific). If this uniform scale represents the predominating interstate rate level on pulpwood throughout the South, then the present rate situation in Tennessee, in instances where the intrastate rates in Tennessee are higher than the uniform scale, actually results in discrimination against intrastate commerce—not undue discrimination against interstate commerce as found in this report. The further increases in the present Tennessee intrastate rates required by these findings will widen the existing rate differences in favor of interstate commerce.

This report finds that the present intrastate rates on wood do not result in undue prejudice and preference as between persons and localities in interstate and intrastate commerce. But in correcting the stated unjust discrimination against interstate commerce, this report seems to approve two different intrastate rate levels on pulpwood in Tennessee. It is reasonable to believe that this will create, as between intrastate shippers, rate inequalities of the character prohibited by section 13(4) as between interstate and intrastate shippers. This results from requiring increases in Tennessee intrastate rates over certain lines which rates are already higher than the uniform scale that will continue in force (intrastate) over other lines in Tennessee, including

the Southern and the Cincinnati, New Orleans & Texas Pacific.

The fact that, for the purposes previouly indicated, many carriers in southern territory have established and now maintain rates on pulpwood that are lower than the present intrastate rates over certain lines in Tennessee fully substantiates protestants' evidence of record in this proceeding that the proposed increases in the present Tennessee intrastate rates on wood will not produce any substantial increase in respondents' revenues, but instead, probably will result in a decrease in their revenue from that traffic.

The conclusion of certain respondents, relied upon in this report, that the imposition of these increases on the intrastate transportation of coal and wood will not result in any substantial reduction in the volume of movement by rail, either by diversion to other forms of transport or by suppressing the movement, is not only contrary to the evidence before us by the principal shippers who actually control the routing of this intrastate traffic, but it is also directly contrary to the judgment of the Tennessee Commission entered after a full investigation of the transportation and competitive conditions prevailing throughout Tennessee.

The factual situation set out in this report, in my opinion, does not provide a sound legal basis for the exercise of our power under section 13(4) requiring any increases in the present Tennessee intrastate rates on either coal or wood.

Commissioner Aitchison did not participate in the disposition of this proceeding.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX A

Commodity	Ex Parte 166 Interstate	Ex Parte 166 Intrastate	Ex Parte 168 Interstate in Addition to Rates Under Col. 2	Ex Parte 168 Intarstate in Addition to Rates Under Col. 3
(1)	(2)	(3)	(4)	(5)
Agricultural Limestone, ground or pulverized, in open top cars	25%, Max. 1½c 100 lbs.	10%, Max. 1½c 100 lbs.	10%	Made same as rates on road aggregates
Agricultural Limestone in closed cars or in open-top cars protected by tarpaulin or other protective covering	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Agricultural Slag	25%, Max. 1½c 100 lbs.	10%, Max. 1½c 100 lbs.	10%	10%
Alfalfa Meal	25%	25%	10%	Rates reduced to 18½% of 1st class
Brick, fire or paving	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Cement	25%, Max. 4c 100 lbs.	10%, Max. 4c 100 lbs.	10%	10%
Clay:				
In open-top cars not protected by tarpaulin or other protective covering	25%, Max. 1½c	10%, Max. 1½c	10%	10%
Inclosed cars or open-top cars protected by tarpaulin or other protective covering	25%, Max. 6c 100 lbs.	10%, Max. 6c 100 lbs.	10%	10%

APPENDIX A—Continued

Commodity	Ex Parte 166 Interstate	Ex Parte 166 Intrastate	Ex Parte 168 Interstate in Addition to Rates Under Col. 2	Ex Parte 168 Intrastate in Addition to Rates Under Col. 3
(1)	(2)	(3)	(4)	(5)
Coal	(20%, Max. 40c	10%, Max. 40c	10%	10%
Coke	(N. T. or 45c GT	N. T. or 45c GT	10%	10%
Fertilizer	25%, Max. 8c 100 lbs.	10%, Max. 8c 100 lbs.	10%	10%
Phosphate Rock	25%, Max. 5c 100 lbs.	25%, Max. 5c 100 lbs.	10%	....
Sand, except common	25%, Max. 3c 100 lbs.	10%, Max. 3c 100 lbs.	10%	10%
Wood: Chemical Acid Pulp Fuel	25%	15%	10%	10%
Switching charges on the above commodities except wood	25%	10%	10%	10%

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APPENDIX B

1947

Road	Value	Net Railway Operating Income	Rate of Return
Southern Railway	$ 622,426,300	$ 21,375,013	3.43%
CNO&TP	84,122,947	6,193,843	7.36%
I-C	542,292,808	24,318,396	4.48%
GM&O	194,502,068	6,876,002	3.54%
NC&StL	100,146,912	1,936,033	1.93%
L. & N. Railroad	415,510,532	16,280,657	3.92%
Tenn. Central	8,669,814	170,976*	.....
Total	$1,967,671,381	$ 76,808,968	3.90%

1948

Road	Value	Net Railway Operating Income	Rate of Return
Southern Ry.	$ 643,921,507	$ 29,148,740	4.53%
CNO&TP	78,582,193	8,327,292	10.60%
I-C	557,736,762	29,770,116	5.34%
GM&O	194,727,523	9,097,324	4.67%
NC&StL	103,332,725	2,932,666	2.84%
L. & N. Railroad	439,753,695	21,175,636	4.82%
Tenn. Central	8,624,500	29,152	0.34%
Total	$2,026,678,905	$100,480,926	4.96%

1949

Road	Value	Net Railway Operating Income	Rate of Return
Southern Ry.	$ 635,100,499	$ 21,863,820	3.44%
CNO&TP	76,527,029	6,224,560	8.13%
I-C	572,896,421	25,184,679	4.40%
GM&O	206,242,412	7,008,946	3.40%
NC&StL	112,390,311	3,422,130	3.04%
L. & N. Railroad	445,700,180	12,836,069	2.88%
Tenn. Central	10,010,091	404,253	4.04%
Total	$2,058,866,943	$ 76,944,457	3.74%

*Deficit

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of August, A. D. 1952.

No. 30720

TENNESSEE INTRASTATE RATES AND CHARGES

This proceeding having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on May 19, 1952, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and

It appearing, That as set forth in said report and in accordance with the practice in such proceedings, the Commission stated that an order carrying into effect the findings in said report would be entered, unless we were notified by the Tennessee Commission, within 30 days from June 4, 1952, the date of service of said report, that it would permit promptly the increases therein approved, and that no such notification has been made by the Tennessee Railroad and Public Utilities Commission:

It is ordered, That the respondents in this proceeding, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before Nov. 28, 1952, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing (1) the unjust discrimination against interstate commerce, and (2) the undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce, found in said report to exist.

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before Nov. 28, 1952, upon notice to this Commission and to the general

public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply for the intrastate transportation of freight from and to points in the State of Tennessee freight rates and charges which shall be no lower than the approved rates and charges, as provided in said report.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX "C"

PERTINENT SECTIONS OF THE STATUTES INVOLVED

Interstate Commerce Act, 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911:

Sec. 13. . . .

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such

State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Interstate Commerce Act, 41 Stat. 488, as amended, 48 Stat. 220, as amended, 54 Stat. 912:

Sec. 15a. . . .

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the fur-

nishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Administrative Procedure Act, 60 Stat. 241:

Sec. 7. . . .

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Administrative Procedure Act, 60 Stat. 242:

Sec. 8. . . .

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunty to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for

such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act, 60 Stat. 243:

Sec. 10. . . .

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.